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No. 10-204

Supreme Court, U.S.
FILED
OCT 13 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

E. S. H.,

Petitioner

v.

K. D., et al.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION

MARYANN CONWAY, ESQUIRE
MARYANN CONWAY
& ASSOCIATES, PC
P.O. Box 731
1825 West Market Street
Pottsville, PA 17901
(570) 628-4852

KAREN E. RISMILLER, ESQUIRE
Counsel of Record
The Landmark Building
115 South Centre Street
Pottsville, PA 17901
(570) 628-2333

LORI SCHAFER GUZICK, ESQUIRE
WILLIAMSON, FRIEDBERG & JONES
Ten Westwood Road
Pottsville, PA 17901
(570) 622-5933

Counsel for Respondents

232688

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

I. Whether the United States Supreme Court has jurisdiction where Petitioner Eric S. Harner failed to present to the state courts below the issues raised in his Petition for Writ of Certiorari?

II. Whether Petitioner has presented compelling reasons for this Court to grant the Writ for Certiorari, where:

A. The state trial court determined that Petitioner posed a significant, real threat of harm to his child, O.H., and therefore precluded Petitioner from enjoying the presumption that he would make decisions in the best interests of the child?

B. Where the trial court properly weighed Petitioner's right to physical custody of O.H., while applying the statutorily-required best-interests analysis, rather than the "actual harm" standard advocated by Petitioner?

C. Where this Court's plurality decision in *Troxel v. Granville* is neither factually nor procedurally applicable to the instant case?

D. Where the trial court found as a matter of fact that Petitioner acquiesced to stepfather K.D. acting as a *de facto* parent, and therefore held that K.D. had standing *in loco parentis* to seek custody of O.H?

E. Where Petitioner fails to also challenge the trial court's determination that S.C., the maternal grandmother, has standing to seek partial custody?

F. Where Petitioner ignored the wishes of the child, O.H., to live primarily with K.D. and partially with Petitioner?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are Respondent, the original plaintiff in this custody action and stepfather of O.H., Kent Deeter (hereinafter K.D. or Stepfather), who acted as a *de facto* parent to O.H. during her Mother's frequent illness and after her Mother succumbed to that illness; Respondent Sandra L. Cooney (hereinafter S.C.), the maternal grandmother, to whom Petitioner agreed to give *in loco parentis* standing and partial custody of O.H.; and Petitioner Eric S. Harner (Petitioner or Father), the biological father of O.H. and original defendant.

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STATEMENT OF THE CASE

A. Factual and Procedural History

The instant custody matter concerning nine-year-old, O.H. arose as the result of the death of her mother, Karen Deeter (hereinafter Mother) on May 23, 2007. Mother and Father, Eric S. Harner (hereinafter, Petitioner) married in 1995, and their daughter O.H. was born in 1998. Shortly thereafter, Mother developed an incurable disease of the liver, Walter Payton's disease, also called primary sclerosing cholangitis. Petitioner was aware that approximately every three months, this disease incapacitated Mother, until her death in 2007.

Mother separated from Petitioner in April of 2001 when O.H. was three years old. Shortly after the separation Mother filed a Protection From Abuse complaint against Petitioner, which was granted as a permanent order. Mother and Petitioner were eventually divorced in April of 2004. That same year Petitioner remarried. In February of 2005 Mother and O.H. moved into the home of K.D., and in March of 2006, Mother and K.D. were married.

With the permission of Mother, K.D. was listed on O.H.'s emergency contact cards and permission slips. He provided primary care to O.H. during the periods that Mother illness prevented her from doing so. On Fridays and when K.D. was laid off from work, he cooked, cleaned and had breakfast with O.H. He packed her lunch and school bag. K.D. took O.H. to friends' and relatives' houses, participated in fundraisers for her extracurricular activities, delivered Girl Scout cookies,

took her to cheerleading practice and tournaments, and football, softball and basketball games. He attended parent-teacher conferences, maintained communication with O.H.'s teachers, attended her concerts and plays, signed homework, helped O.H. paint her room, created a play room for her within his home, bought her a dog "Charlie," and did her laundry. During the years O.H. lived with K.D. and her mother, Petitioner never objected to K.D.'s involvement in O.H.'s life, nor did he ask to modify his partial custody arrangement. Since Mother's death, K.D. has been paying to provide O.H. with health insurance and, without contribution from Petitioner, co-pays doctor, prescription and dentist bills. Father has not paid support since Mother died and K.D. has not asked for support.

During Mother's life, Petitioner never contacted O.H.'s teachers, or knew their names, or her coaches' names, or attended any events. Petitioner relied on his wife to keep track of O.H.'s extracurricular activities. The custody order in effect at the time of Mother's death provided Mother with primary physical custody and Petitioner with partial physical custody every other weekend and every Wednesday evening for two and one-half hours.

On May 24, 2007, one day after Mother's death, Petitioner came to K.D.'s home demanding full custody of O.H., and took the child to his home in another county. K.D. filed a complaint for custody against Petitioner on May 30, 2007, seven days after Mother's death. S.C. (Sandra Cooney, maternal grandmother of O.H.) filed a complaint as an additional defendant on June 8, 2007. A lengthy trial ensued. The court-appointed evaluator

recommended, *inter alia*, that O.H. remain primarily in K.D.'s custody, that the maternal grandmother S.C. continue to have significant contact with O.H. and that Petitioner be treated for anger issues. The evaluator was concerned that the issue of loss was the dominant theme in O.H.'s life. The evaluator expressed concern that O.H. would be further injured by removing her from the home she lived in with her mother, from the school she loved, from the place where her mother is buried, from all of her friends and her dog, from her extended maternal family, and from the people, activities and church that had become a significant part of her mother's and O.H's life.

O.H. testified at the trial. She described K.D.'s home as her home; described K.D. as "like a Dad", and expressed her desire, and explained her reasoning, to have things remain the way they were when her mother was alive.

On April 8, 2009 the trial court entered a 92 page Opinion and Order finding K.D. had standing *in loco parentis* and S.C. had standing statutorily to seek custody of O.H. The trial court's opinion is attached as Appendix B to the Petition for Writ of Certiorari.

In the Opinion, the trial court determined that Petitioner was an unreliable witness. The court identified specific facts and detailed numerous instances where Petitioner's conduct was so damaging that Petitioner was found to "pose harm or a significant, real threat of harm to [O.H.]." Trial Court Opinion dated April 8, 2009 ("Trial Court Opinion"), reproduced in the Petition for Writ of Certiorari ("Petition"), at Appendix ("App.") B, page 109a.

In applying the statutorily mandated best interest analysis, the trial court granted shared legal custody to Petitioner and K.D., primary physical custody to K.D., and partial physical custody to Petitioner. S.C.'s partial custody was to be exercised during K.D.'s periods of custody. Petitioner was also ordered to attend parent counseling with K.D. and to attend additional counseling for "long-standing" anger issues. *Id.* at 123a.

Petitioner timely appealed to the Pennsylvania Superior Court, which affirmed the trial court in an unpublished opinion dated December 21, 2009 and which is attached as Appendix A to the Petition. Petitioner requested a writ of certiorari to the Pennsylvania Supreme Court, which was summarily denied on May 3, 2010.

B. Correction of Misstatements Pursuant to Supreme Court Rule 15

Supreme Court Rule 15 requires that if we perceive that Petitioner has made any misstatements of fact or law in his Petition for Writ of Certiorari, we must notify the Supreme Court that we do not agree with his statements, or the misstatements are deemed waived. There are multiple factual misstatements in the Petition.

1. Father states in his Petition at pages 2 and 21 that "Father has remained a constant presence in O.H.'s life since her birth[,]" and that he "was always active and involved in O.H.'s life..." This is a misstatement. As described above, Petitioner had little if any involvement in O.H.'s life and had custody only on alternating weekends. Trial Court Opinion, Petition, at App. B, page

28a, 83a. He did not attend her events, teacher conferences, or doctor's appointments. *Id.* at 77a-79a. He failed to carry health insurance for her or pay child support to Mother and in fact was incarcerated for failure to pay child support during Mother's life. He has contributed nothing towards her clothing, medical or school expenses for nearly two years. *Id.* at 79a -80a.

2. Petitioner misstates in his Petition at pages 2 3 that he "enjoyed custody on three out of four weekends per month." The trial court found that Father had partial custody on alternating weekends, not three out of four weekends per month. *Id.* at 28a, 83a.

3. Petitioner misstates in his Petition at page 3 that "Father's fitness to parent his child has never been questioned." The trial court found as a matter of fact that Father had been found guilty of Harassment as to Mother; was the subject of a Protection from Abuse Order entered during Mother's lifetime; failed to pay child support; failed to attend OH's games, plays, and concerts, or even to know who the relevant people in her life were; failed to attend parent-teacher conferences, or even to know who O.H.'s teachers were; failed to object to K.D. acting *in loco parentis* during Mother's life, or to make any attempt to parent O.H. during the times of Mother's incapacitation. The lower court found, in effect, that Petitioner's acts and failures to act rendered him unfit as a parent and that the presumption of a parent's right to make decisions in the best interests of O.H. was outweighed by the need for the State, K.D., S.C. and O.H. to "assure that the health and emotional welfare of [O.H.] are protected, in particular, such as here, where actions by her parent

pose harm or a significant, real threat of harm to [O.H.]." Trial Court Opinion, Petition, at App. B, page 109a.

4. Father misstates in his Petition at pages 3 and 21 that he "never consented to K.D.'s assuming parental status and never relinquished parental authority to K.D. . . . [and that] K.D. acted in the limited role of a care-giver consistent with his marriage to Mother." This is the basic premise of one of Appellant's arguments, and is a complete misrepresentation of the facts found and affirmed in the lower state courts. Both the trial court and the Pennsylvania Superior Court found that:

- Father was well aware of Mother's illness (Trial Court Opinion, Petition, at App. B, page 77a);

- Father knew that K.D. was providing care for O.H. during Mother's life (*Id.* at 77a);

- Father knew that K.D. was supporting O.H. financially, especially since Father had been incarcerated for non-support;

- Father did not object when K.D. provided for O.H. financially, handled her academic or medical issues or her extra-curricular activities.

- Father also ignores the fact that Mother permitted K.D. to care for O.H. during her frequent periods of incapacity and wished

her to continue living with K.D. after her death. *Id.* at 105a.

5. Father understates Mother's condition in his Petition at page 3: "[t]hroughout her adult life, Mother suffered from primary sclerosing cholangitis," became sick with pneumonia and then died." Mother died from primary sclerosing cholangitis, and from the time of O.H.'s birth had been hospitalized and incapacitated frequently because of the disease. When Mother was severely ill and still living with Petitioner, S.C. had to come to Petitioner's home to care for O.H. Petitioner knew that Mother's illness was completely debilitating and reoccurred frequently.

6. Petitioner misstates at pages 3-4 that he "always strenuously objected to K.D. seeking *in loco parentis* status...." In fact, Petitioner did not object to K.D. acting as a *de facto* parent during mother's frequent incapacitation during her illness. After Mother's death, and after K.D. filed his Complaint for Custody, Father *then* objected to K.D.'s parental role in O.H.'s life. Prior to that, Father has never objected to K.D. providing health insurance and financial and emotional support to O.H.

REASONS FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction Because Petitioner Failed to Raise The Issues Below

Respectfully, this Honorable Court lacks jurisdiction over the issues Petitioner is presenting to this Court. Petition failed to raise these issues before the Pennsylvania courts.

This is a custody case, and other than random, unintelligible statements concerning "fundamental parental rights," Petitioner never asked the Court of Common Pleas of Schuylkill County, Pennsylvania to consider applying a strict scrutiny analysis to a parent's rights as articulated by *Troxel v. Granville*, 530 U.S. 57 (2000), nor did Petitioner ask the trial court to consider whether Pennsylvania's *in loco parentis* doctrine is unconstitutional, or whether Pennsylvania's statutes that requires its courts to consider the best interests of the child violated the United States Constitution. In fact, nowhere in the Petition for Writ of Certiorari does Petitioner even cite the Pennsylvania statute requiring the court to consider factors that concern the best interests of the child and the child's physical, intellectual and emotional well-being. 23 Pa.C.S. § 5303(a)(1). Petitioner fails to raise with this Court and has never asked the Pennsylvanian courts to address the constitutionality of the statutorily based best-interests analysis. Petitioner merely makes bald and unspecific allegations of a constitutional violation not raised in lower state court and not addressed by the state courts.

This Court need only read the trial court's lengthy ninety-two (92) page opinion to see that Petitioner never raised these constitutional issues before the trial court. Trial Court Opinion, Petition, at App. B, pages 25a-132a. The trial court acknowledged the fundamental right of a fit parent to make decisions regarding the care, custody and control of their child. *Id.* at 105a and 109a. *Troxel*, however, is mentioned only in footnote 8 of the opinion when the trial court noted Justice Steven's comment about the rights of the child and their interests, which he correctly notes as being implicated in every custody case. *Id* at108a n.8. The trial court's opinion does not contain any mention of a challenge to any Pennsylvania case or statute by the Petitioner based on the United States Constitution or the Fourteenth Amendment.

After the trial court entered its Opinion and Order, Petitioner did not ask for rehearing to raise these issues. Petitioner instead appealed the decision to the Pennsylvania Superior Court. That unpublished and non-precedential decision is found in the Petition at Appendix A, 1a-24a. The issues raised by Petitioner in his brief to the Pennsylvania Superior Court were listed verbatim within that court's opinion. Pennsylvania Superior Court Opinion ("Superior Court") filed December 21, 2009, attached to the Petition at App. A, page 5a. Petitioner raised two issues involving any mention of a constitutional challenge:

> II. Whether the [trial] court deprived [Father] of his constitutional right to parent and direct the upbringing of his child?

> III. Whether [Father's] [p]rocedural [d]ue [p]rocess rights under the Fourteenth Amendment were violated when the [trial] [c]ourt issued its interim [o]rder requiring the child to remain in the custody of [Stepfather], a third party, pending the outcome of the custody trial[?]

App. A at 5a.[1] The Superior Court dismissed Petitioner's Issue III as waived. Petition, App. A at 15a. The Superior Court addressed Issue II, but only in terms of the Pennsylvania Supreme Court's decision in *Shepp v. Shepp*, 906 A.2d 1165 (Pa. 2006), which applies a strict scrutiny analysis to a parent's fundamental rights, and which the Superior Court found inapposite to this case. Petition, App. A at 13a. The Court further addressed Issue II by affirming the trial court's proper application of the bests interests analysis to this child, in this case, one in which the trial court found the natural parent, Petitioner, to be, essentially, an unfit parent, which is addressed below.

Our Pennsylvania Supreme Court denied Petitioner's Writ for Certiorari without opinion.

We believe Petitioner's failure to raise these particular issues specifically below is evidenced by his

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1. The other two issues involved challenges as to whether the trial court erred in granting *in loco parentis* standing to the stepfather to seek custody of the child, and whether the stepfather failed to meet his burden of proof in the best interests analysis. Petitioner's fifth issue, the fourth issue listed in his brief before the Superior Court, was actually a typographical error and was omitted from the Superior Court's opinion.

failure to follow Supreme Court Rule 14(g)(i). Petitioner's Concise Statement of the Case fails to include this required information because he did not specifically raise these issues to the state courts. As a result, the state courts were unable to address or even consider the issues now contained in the Petition for Writ of Certiorari.

Petitioner states that both the trial court and the Pennsylvania Superior Court "refused to recognize" *Troxel*, and his reliance on *Troxel* in the case of the Superior Court Opinion, (Petition at 6, 8), but Petitioner does not state exactly when, where and how he raised any United States Constitutional issue before either the trial court, the Pennsylvania Superior Court, or the Pennsylvania Supreme Court, as required by Rule 14(g)(i). Thus, the issues are waived, and respectfully, this Court does not have jurisdiction over them.

II. No Compelling Reasons Exist To Grant Certiorari In This Matter

None of the Pennsylvania courts in this case decided any issue involving an important federal question, let alone one that conflicts with relevant prior decisions of this Court. This is a custody case in which a biological parent, who was found to pose harm to his child, is seeking to remove that child from her now-deceased mother's home, family, and community. Petitioner is attempting to change the findings of the trial court and the holdings of the Pennsylvania courts into a vehicle for the Supreme Court to create a national standard for custody: namely, to require a showing of actual harm to the child before a natural parent may lose custody.

To push this agenda, Petitioner has misstated the clear determinations of the trial court to fit a scenario and bolster the issues he wishes to present to the Court, even though the issues were not addressed or raised below, and his representations are not supported by the record. For the following additional reasons, this Court should deny the Petition for Writ of Certiorari.

A. Petitioner's Rights as a Parent to Have Primary Custody of his Child Were Adequately and Carefully Considered but Ultimately Outweighed by the State Trial Court's Finding That Petitioner's Actions "Pose Harm or a Significant, Real Threat of Harm" to the Child.

Although we believe these issues waived, we will proceed to briefly address the merits of Petitioner's claims and address why this Court should not grant the Petition for Writ of Certiorari.

Petitioner calls himself a "fit parent" and suggests that, based on his version of the facts of this case, this Court should adopt a standard, applicable to all state court custody cases, that unless there is proof of *actual harm* to a child by a parent, that parent should have custody of the child regardless of anything else, including the child's rights and wishes. Petitioner is not, however, a "fit" parent, and is therefore not entitled to a presumption that he will make decisions which are in the best interests of O.H.

The trial court spent much of its opinion reviewing Petitioner's interactions with the child and other family

members, as well as the stepfather, maternal grandmother and their families, and concluded that Petitioner's "actions . . . pose harm or a significant, real threat of harm to [the child]."[2] Petition, App. B at 109a. The trial court recommended and ordered that a counselor address Petitioner's anger issues and any possible abuse issues. *Id.* at 123a, 129a. Petitioner was ordered to obtain and continue with anger management and other counseling, as deemed necessary, until successfully discharged by the counselor. *Id.* at 129a-130a. Further, Petitioner's mother-in-law is not allowed to have unsupervised contact with the child based upon the determination of the trial court that much of her testimony at trial was "disturbing in the context of a custody action involving a young child" and was not credible. *Id.* at 50a,128a.

Petitioner throughout the appeal process has continued to call himself a "fit" parent, despite the clear findings of the trial court. Petitioner is basing his appeal upon fabricated or misinterpreted factual determinations of the trial court. Petitioner's "fundamental" rights as a parent, and to parent, were adequately and carefully considered by the trial court. The only way he can argue that he should have custody is by ignoring the trial court's findings as to his "fitness." If this Court wishes to visit the issue of a biological parent's Constitutional right to parent and be a parent versus other factors such as best interests of the child, this is not the set of facts upon which the Court should base such a determination.

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2. During the proceedings, the trial court felt it necessary to appoint separate legal counsel for the child.

B. *Troxel* is Factually Distinguishable from This Case and Should Therefore Not Be Applied.

Troxel is factually distinguishable from this case because it involved a suit for visitation by the children's paternal grandparents, under a sweepingly broad Washington state statute, which its highest court had already deemed unconstitutional. Father had died, and prior to his death only had visitation rights with the children on weekends. *Troxel*, 530 U.S. at 60. Mother, a fit parent (and with no concerns expressed about her parenting abilities whatsoever), wished to limit but not end the visitation. The grandparents wished to have more visitation time against Mother's wishes. *Id.* at 60-61, 68. The Washington statute allowed anyone, at any time, to petition a court for visitation rights, and accorded no deference or weight to the parent's choices regarding visitation. *Id.* at 67. This Court held that the Washington statute infringed on a fit parent's fundamental right to parent and be a parent. *Id.*

Several key points distinguish this case from *Troxel*. Here, the trial court below described Petitioner in terms which can only be used to describe an unfit parent. *Troxel* involved a fit parent, who was able to make decisions and act in the best interests of her children; therefore, she was entitled to a presumption before the state court that she would make decisions in the best interests of her children.

Petitioner is not a fit parent and is not able to make decisions and act in his child's best interests. The trial court considered the harm Petitioner was found to pose

to O.H. and awarded primary physical custody to K.D. Therefore, *Troxel*'s holding that

> so long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children

simply does not apply here. *Id.* at 68-69.

Second, *Troxel*'s main issue was whether a Washington visitation statute violated the Federal Constitution. The Petition for Writ of Certiorari does not quote or even cite any Pennsylvania custody statute that may be at issue.

Third, the Washington lower courts imposed their belief of what was in the best interest of the child onto the fit Mother, without taking her wishes into consideration. That is not the case here. The trial court carefully weighed Petitioner's wishes, as well as all of the factors required to be considered by Pennsylvania statutory law, including the child's wish to live primarily with her stepfather and visit regularly with her father. Petitioner was found to essentially be an unfit parent, and since a disposition in favor of Petitioner would cause harm to the child, the Court decided that he should not have primary custody of the child.

Finally, there was no evidence in *Troxel* that the Mother wished to cut off visitation with the paternal

grandparents entirely; she just wished to decrease it. *Troxel*, 530 U.S. at 71. Here, the trial court found that Petitioner would not continue a relationship between O.H. and her mother's new family; the trial court stated, "All reliable evidence indicates that it is highly unlikely that [Father] would foster any relationship between [O.H.] and any other person in this case, including [K.D] or [S.C]." Trial Court Opinion, Petition at App. B., page 116a.

For these reasons, this Court should find *Troxel* inapplicable to the case at hand.

C. Petitioner is not a "Fit Parent" and The Pennsylvania Trial Court Correctly Applied *In Loco Parentis* to Give the Child's Stepfather Standing To Ask for Physical Custody Over the Child

Petitioner argues that Pennsylvania's *in loco parentis* doctrine violates his fundamental rights to parent his child as stated in *Troxel*. He misrepresents to this Court that he is a "fit parent" and that he never agreed to K.D. exercising parental authority over the child, calling K.D. a mere "squatter" to Petitioner's rights to his child, as if the child is a chattel. Petition at 22. Petitioner's fitness is addressed above. Petitioner ignores the fact that the trial court and the Pennsylvania Superior Court found that Petitioner knew of, and acquiesced to, K.D.'s care for and support of the child. Petitioner ignores three other facts: first, that O.H.'s deceased mother wished her to be parented by the stepfather; second, that Petitioner only opposed giving standing to the stepfather but not to the maternal

grandparent; and third, that the child desired to live with her stepfather and have regular visits with her father. His argument, therefore, is based on factually inaccuracies and contains no compelling reason for this Court to consider granting his writ of certiorari.

Petitioner's argument that he never agreed to K.D. being a parent to O.H. is a fact-based argument unsupported by the record below and against the findings of the trial court, affirmed by the appellate court. This is not an argument worthy of the attention of this Court.

Both the trial court and Pennsylvania Superior Court found, contrary to Petitioner's argument, that Petitioner knew 1) Mother was very sick ever since O.H. was born and at times was incapable of caring for their child, and that K.D. cared for the child during those times; 2) that K.D. was providing for both Mother and O.H. financially, especially when Petitioner was incarcerated on one occasion for non-payment of support, and 3) that K.D. consistently attended O.H.'s school affairs, met with her teachers, covered O.H. with health insurance, made sure she obtained medical, dental and eye care. Superior Court Opinion, Petition at App. A, page 11a (quoting Trial Court Opinion at 74-75). O.H. testified that K.D. was like a dad to her, and she had feelings for him as a dad. *Id.* Both courts concluded that Petitioner "tacitly consented" to K.D. performing parental duties for O.H. and that Petitioner offered no argument against that, or the support K.D. was providing, until days after the Mother's death. *Id.*

Petitioner simply does not address the fact that the Mother had been in an abusive first marriage with Petitioner, held a Protection From Abuse Order against him, and wished her child to be raised by K.D. after her death.

Petitioner also does not address the fact that he did not object to K.D.'s mother-in-law, S.D., also a third party, having standing *in loco parentis* and consented to her having partial physical custody of O.H.

Finally, Petitioner does not address at all the child's wishes in this case. While we do not advocate that a child's wishes should be more important than a fit parent's wishes, we believe that a child has constitutional, fundamental rights as well as a parent. "Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case . . .—the child." *Troxel* at 86 (Stevens, J. dissenting). The best interests standard used by many states including Pennsylvania weighs all of the interests implicated in a complex custody battle, not just one. *Troxel*'s multiple concurrences and dissents illustrate that the Justices of this Court were highly divided on what issues should have been decided by the plurality, if at all. One thing, however, came across clearly from all: no one advocated that an actual harm standard should be adopted, as is being proposed by Petitioner.

CONCLUSION

The Petitioner failed to properly raise in the state courts below the issues he now wishes this Court address. As such, the lower state courts were unable to pass upon the issues raised by Petitioner.

Further, the repeated misstatement of numerous facts and the sound legal reasoning upon which the trial court based its determination, combined with the Pennsylvania Superior Court's opinion affirming the trial court's conclusions fails to establish a sound basis upon which federal constitutional issues should be addressed, especially since those issue were not raised or addressed by the parties or the lower state courts.

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted:

KAREN E. RISMILLER, ESQUIRE
Counsel of Record
The Landmark Building
115 South Centre Street
Pottsville, Pennsylvania 17901
(570) 628-2333

LORI SCHAFER GUZICK, ESQUIRE
WILLIAMSON, FRIEDBERG & JONES
Ten Westwood Road
Pottsville, Pennsylvania 17901
(570) 622-5933

MARYANN CONWAY, ESQUIRE
MARYANN CONWAY & ASSOCIATES, PC
P.O. Box 731
1825 West Market Street
Pottsville, Pennsylvania 17901
(570) 628-4852

Counsel for Respondents